



LLA 830 Workbook –Probation

LEARNER WORKBOOK

Outcomes

What will a student doing this course learn and be able to do?

On completion of this module and the assessment questions you will be able to-

- ✓ Classify and distinguish probation from other labour practices;
- ✓ Explain the purpose of probation
- ✓ Define probation
- ✓ List the elements of probation
- ✓ Understand the process of assessing an employee's performance
- ✓ Design a performance review
- ✓ Evaluate a performance assessment process with regard to its fairness
- ✓ Interpret a clause requiring probation in an employment contract
- ✓ Understand the procedural requirements of a fair dismissal of a probationary employee
- ✓ Understand the substantive requirements of a fair dismissal of a probationary employee
- ✓ Analyse and apply the law to a set of facts
- ✓ Present evidence at a probationary enquiry and arbitration concerning probation
- ✓ Assess evidence heard at a probationary enquiry or arbitration concerning probation and deliver a fair finding or award.

1. Introduction

Probation occurs in a number of contexts: in the employment contract, in incapacity dismissal, and as a form of unfair labour practice.

2. Probation

The _____ of probation, according to the Code of Good Practice: Dismissal, is to give the employer an opportunity to _____ the employee's _____ before confirming the appointment.

Why is probation necessary?

The definition of probation: Probation is a _____ which is regarded as _____, during which an employer _____ and assesses an employee's performance, that is the _____ to do the work for which he was employed.

Probation has the following elements: -

- An _____ between _____ and employee
- Concerning a period of time which is _____
- During which the _____ is assessed
- And a _____ is then made as to the employee's performance.

Agreement: there must be an _____ between the parties.

Reasonable: in this context is determined by the _____ and relative _____ of the employee's job, as well as making time for the employer-
topically the employee's manager- to _____
of the employee's performance

Assess the employee's performance: must be done _____ the period of probation. It is best practice to conduct assessments at _____ during the probationary period.

Determination: The employer _____ make a decision as to the suitability of the employee's performance and _____ the employee of that decision.

What is not permissible because it is unfair and _____ is to not grant probationary employees the same benefits as other employees employed at the same level.

3. Assessing an employee's performance during probation

An employee-on-probation's performance should be assessed during the period of probation.

Employers should understand that the way they assess performance in this context will be subjected to scrutiny in the event that the employee's performance is not satisfactory and the decision is made to dismiss the employee.

Performance should always be assessed _____, that is the work the employee is employed to perform.

Usually the employee's job is assessed by way of _____ [KPA's],

Each KPA is given a _____ reflecting the relative importance of that task within the entire job, usually reflected as a _____.

Each KPA is given _____ against which the employee's performance is measured.

The employee and his manager _____ these outcomes in the _____ performance meeting.

After a _____ the employee and his manager hold a _____ performance appraisal. This results in an identification of the tasks which the employee is performing at an acceptable level and those which are not.

After a _____ of time, the employee attends his final assessment. If the employee's performance is found to be acceptable, the probation period ends, and the employee is informed of this.

If the employee's performance is found not be at an acceptable level, then the employee's _____ for a further period- one which is reasonable, meaning sufficient time for the employee's performance to reach the level required. Alternatively, the employer could also then decide to _____ the employee's employment.

Employers should note that the entire process- that is the meeting and interactions between the probationary employee and her manager should be _____. It is preferable that _____ notes be taken.

4. Probation as a term of a contract of employment

The Code of Good Practice: Dismissal, and item 8(1)(c) states:

"Probation should _____ for purposes not contemplated by this Code to _____ employees of the status of _____ employment.

This does _____ that a contract of employment can not include a probationary clause.

The Code of Good Practice: Dismissal makes this plain by stating that an employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed- item 8(1)(a).

A term in a contract of employment providing for probation _____ of the contract as with a fixed term contract of employment.

Unless a contract of employment contains and specifically includes a period of probation, the contract is not subject to probation. In other words, a period of probation **is not implied** into a contract of employment.

The _____ for probation must be _____ and _____ – agreement is attained by the _____ of parties to the contract.

Where a contract of employment includes a period of probation, the effect is that the contract is _____ until such time as the employer has confirmed the employee's employment at which time the employment becomes permanent.

5. Dismissal of an employee during probation

As with any dismissal, the dismissal must be fair meaning it must be both _____ and _____ fair.¹

There is _____ of the procedural with the substantive aspects of fairness in the context of probationary dismissals.

5.1 Procedural fairness

The probationary employee's performance _____ assessed.

If the employer determines that the employee's performance is below standard, the employer _____ the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards.

If the employer believes that the employee is _____ the employer should _____ the employee of the _____ in which the employee is not competent.

The employer is required by the Code of Good Practice: Dismissals to give a probationary employee _____, instruction, _____, _____ or counselling in order to allow the employee to render a satisfactory service.²

¹ Section 180 LRA: 'Every employee has the right not to be unfairly dismissed', and section 188 LRA which talks to the procedure and reason for dismissal.

² Item 8(1)(e)

This must be done _____ and _____ the employee's performance is _____ and must be done _____ the probationary period and is part of the procedural requirements of a fair dismissal in the present context.

When should a probationary employee be given training? *Ismail*

"There is _____ prescribed in the code as to the nature of training, evaluation, instruction, guidance and counselling to be afforded to employees whose performance is in question, and this includes probationary employees.

Notes _____

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Facts _____

Issue _____

Law _____

Application _____

Conclusion _____

Once the employer has _____ that the probationary employee's performance is not up to standard and that the employee's _____ confirmed, an _____ should be convened.

Procedural fairness _____ requires a _____ to the employee informing her of the date, time and place of a performance hearing and setting out **the**

_____ as being the employee's poor performance. It is suggested that some examples of the employee's alleged poor performance be provided. The employee must be given _____ for the hearing and informed of her _____ in the hearing.

Procedural fairness _____ requires that the employee be given an _____ and to be represented by a fellow employee.

When assessing the procedural fairness of an employee's dismissal in the context of probation dismissals, the _____ approach to the question of substantive fairness of probationary dismissals discussed below would _____.

5.2 Substantive fairness

The following are the _____ of a substantively fair dismissal on the ground of a probationary employee's poor performance:

- a. That the employee was _____
- b. That the employee's performance was _____ and found to be _____.
- c. That the _____ for the employee's dismissal was her poor performance.
- d. That dismissal was the _____.

The onus is _____ party to prove each of these elements.

a. That the employee was on probation
This is a matter of _____ proven by way of the employee's contract of employment and in particular the clause stipulating probation.

b. That the employee's performance was assessed and found to be poor.
The employer must provide evidence that the employee's performance was assessed and that the assessment was fair. This evidence must show that:-

- the assessment was conducted about the employee's _____ the tasks for which the employee was employed _____ an appropriate _____; it must be _____. The criteria assessed and the _____ by which they are assessed must be appropriate –that is _____ for which they are used.

- The assessment was held _____ the probationary period. _____ assessment should be conducted. The _____ on which each assessment was held _____.
- The employee's performance was found not be at an acceptable standard, particularly the final assessment. The assessment must show a _____ between the standard required and the employee's actual performance. The deviation should be _____ and material.
- The assessment/s should be _____ typically the employee's direct manager, who should present the employer's case.

Typically, the evidence would be based on documents completed during the assessments.

It is not possible to list _____-which can be used when assessing an employee's performance. Some examples are:

- _____: the degree to which the employee works to the agreed standard
- Productivity: the degree to which the employee completes work within or on deadline
- _____ work: the degree to which the employee shares information with colleagues
- _____: the degree to which the employee is able to spot problems and report them.
- _____: the degree to which the employee plans and organises work

The standard required for each is set, for example at 3, or 4 on a scale from 1 meaning unsatisfactory and 5 being excellent.

c. That the reason for the employee's dismissal was poor performance
Employers sometimes latch onto a reason for the employee's dismissal which do not reflect the facts of the matter- these cases are referred to as 'disguised dismissals'. Eg SAFA case

d. That dismissal was an appropriate sanction

The Code of Good Practice: Dismissals states:-

(j) Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.³

This has been interpreted as requiring an arbitrator –and therefor the chairperson of a probationary enquiry- to adopt a “_____approach.

Issue with this approach- *Sidumo*.

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Item 8(1)(j) means that during probation..... the employer has the right to dismiss for lesser reasons than would be the case after probation. The employer has the right to 'test' the employee in different situations and determine whether she is capable of coping with the rigours of permanent employment. If a probationary employee is found to be wanting on _____description the employer is at liberty to follow its instincts and _____the employee _____[My emphasis]

5.3 Dispute resolution path

The dispute resolution path is: dismissal- 30 days- referral- CCMA or Bargaining council, then con-arb- award.

6. Probation as an unfair labour practice

Section 186(2)(a) of the LRA defines probation as a form of unfair labour practice, but excludes dismissals of a probationary employee as an unfair labour practice.

The labour practices which may be unfair in the context of probation and which may give rise to a cause of action in terms of s 186(2)(a) are:

- _____an employee's performance during probation;
- _____the employee of their status of _____employee;
- that the assessment was _____given above; or
- that the decision to _____probation was unfair.

³ Item 8(1)(j)

There is however a _____ on any of these potential claims and for that reason the commentary in these notes is limited.

The dispute resolution path of these disputes is similar to that applicable to dismissal disputes, except that the employee has _____ from the date of the unfair labour practice to refer the dispute.

THE END

Complete the assessment to check your understanding of the material covered in this course.

PLEASE LEAVE A REVIEW OF THIS COURSE.

Further reading and study

LLA 810 Procedural fairness of a dismissal for poor performance.

